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In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

v.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On A Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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22795

TABLE OF CONTENTS

Page(s)

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. UNIVERSALLY ACCEPTED PRINCIPLES OF CORPORATE LAW PRECLUDE THE EXTENSION OF PERSONAL LIABILITY TO INNOCENT OFFICERS AND OWNERS OF CORPORATIONS 4

A. LIMITED EXCEPTIONS THAT MIGHT ALLOW FOR A PIERCING OF THE CORPORATE VEIL ARE NOT PRESENT IN THIS CASE 6

B. THE NINTH CIRCUIT'S DECISION FINDING OFFICER AND OWNER LIABILITY IS NOT SUPPORTED BY THE FAIR HOUSING ACT 8

II. IMPOSITION OF PERSONAL LIABILITY ON INNOCENT OFFICERS AND OWNERS OF REAL ESTATE CORPORATIONS WILL INHIBIT THE FUTURE PRODUCTION AND AVAILABILITY OF AFFORDABLE HOUSING STOCK.....12

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES Page(s)

Agins v. City of Tiburon, 447 U.S. 255 (1980) 2

Board of Trustees v. Valley Cabinet,
877 F.2d 769 (9th Cir. 1989) 7

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2

Donsco, Inc. v. Casper Corp.,
587 F.2d 602 (3rd Cir. 1978) 5

Escude Cruz v. Ortho Pharm. Corp.,
619 F.2d 902 (1st Cir. 1980) 4, 5, 10

Heights Community Congress v. Hilltop Realty, Inc.,
629 F. Supp. 1232 (N.D. Ohio 1983) 9

Holley v. Crank,
258 F.3d 1127 (9th Cir. 2001) .....*passim*

International Bhd. of Elec. Workers, Local 332 v. Hyland Wilson Elec. Contractors, Inc.,
881 F.2d 820 (9th Cir. 1989) 11

Lobato v. Pay Less Drug Stores, Inc.,
261 F.2d 406 (10th Cir. 1958) 4

Lowell Staats Mining Co., v. Pioneer Uravan, Inc., 878 F.2d 1259 (10th Cir. 1989) 6, 7

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 2

Marks v. Polaroid Corp., 237 F.2d 428 (1st Cir. 1956) ..5

Marr v. Rife, 503 F.2d 735 (6th Cir. 1974) 9

Marshall v. Coastal Growers Ass'n, 598 F.2d 521 (9th Cir. 1979) 11

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 2

Palazzolo v. Rhode Island, 533 U.S. 606 (2001).....2

Ross v. Playle, 505 N.W.2d 515 (Iowa App. 1993).....7

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 2

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 2

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002).....2

Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975).....10

Uchitel Co. v. Telephone Co., 646 P.2d 229 (Alaska 1982).....7

United States v. Lorantffy Care Center, 999 F. Supp. 1037 (N.D. Ohio 1998).....9

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 2

Yee v. City of Escondido, 503 U.S. 519 (1992).....2

REGULATIONS

24 C.F.R. § 103.20 (1999) 9

OTHER

Black's Law Dictionary 1168 (7th ed. 1999) 6

Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 Denv. U. L. Rev. 763 (1998) ...4, 7

John R. Jones, *Personal Liability? Piercing the Corporate Veil,* 44 For The Defense 6, 41 (2002) 7

Wilson McLeod, *Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law,* 9 Hofstra Lab. L.J. 115 (1991).....11

MIKE E. MILES, et al., REAL ESTATE DEVELOPMENT, PRINCIPLES AND PROCESS 95, 554 (Urb. Land Inst. 3rd ed. 2000).....12

National Association of Home Builders, *Decent Affordable Housing. It's the American Dream* (2001).....13

Endangered Species? Consolidation Tests the Survival Skills of the Large Midsize Builder, Builder, May 2002, at 126.....14

Realty Times Staff, *NAR, NAHB Endorse White House, HUD Minority Housing Initiative* (June 18, 2002).....13

<http://www.centex.com/investor_relations.htm> (assessed July 26, 2002).....14

<http://www.sec.gov/edgar/searchedgar/companysearch.html> (assessed June, 2002).....12

INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies and liabilities under a federal statute that impacts NAHB's members, particularly when any such remedies and liabilities are expanded by a federal court.

NAHB plays an integral role in increasing affordable and mixed-use housing opportunities for all buyers regardless of race, creed, or national origin. Moreover, NAHB is at the forefront of the building industry in increasing minority homeownership and rental opportunities by producing and preserving affordable housing, and through its support of down payment

[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

assistance, single-family affordable housing tax credits, the strengthening of the FHA multi-family insurance program, and the creation of a rental housing production program.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit disregarded universally accepted principles of corporate law in concluding that an innocent officer and owner of a corporate entity is vicariously liable under the federal Fair Housing Act for the discriminatory acts of an employee of the corporation. The Ninth Circuit's overly broad decision casts a wide net of uncertainty over matters concerning corporate liability, the ramifications of which could harm innocent officers, directors, shareholders, and investors of corporations involved in the vital production of safe, quality housing in the United States.

Discriminatory practices in the sale and provision of housing, while abhorrent, will not be effectively eradicated by holding officers and owners personally liable where they were not aware of, approved, nor had any personal involvement in the tortious conduct of employees or agents of the corporation. Merely being an officer or shareholder of a corporation should not render one personally liable for the discriminatory acts of employees or agents of the corporation, unless facts otherwise dictate such liability, or warrant a piercing of the corporate veil.

The effect of the Ninth Circuit's decision, which improperly expands Fair Housing Act liability, will serve to inhibit the personal involvement and capital investment of the very people whose resources are indispensable to an open and healthy housing market – real estate owners and investors. This Court must reverse the erroneous decision below.

ARGUMENT

I. UNIVERSALLY ACCEPTED PRINCIPLES OF CORPORATE LAW PRECLUDE THE EXTENSION OF PERSONAL LIABILITY TO INNOCENT OFFICERS AND OWNERS OF CORPORATIONS

Well-settled in the law is the notion that personal liability generally does not extend to innocent corporate officers or owners for the wrongful acts of employees of the corporation. The mere fact that one is an officer or agent of a corporation does not warrant holding that individual personally liable for the tortious act of an employee of the corporation. *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 908 (1st Cir. 1980); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-409 (10th Cir. 1958). In fact, a contradictory finding defeats the very utility of the corporate form itself, which is to "limit the liability of both the shareholders who comprise it and the directors, officers, and corporate personnel who operate within its parameters."[2]

In a sweeping opinion, the U.S. Court of Appeals for the Ninth Circuit disregarded the traditional underpinnings of corporation law in a search for liability under the Fair Housing Act. *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001). The Ninth Circuit clearly recognized that officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts. *Holley*, 258 F.3d at 1132. Nevertheless, the Ninth Circuit found such liability, holding that a corporation and its officers and

[2] Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 Denv. U. L. Rev. 763 (1998).

owners may be held liable for their failure to ensure the corporation's compliance with the FHA, "whether or not the officers directed or authorized the particular discriminatory acts that occurred." *Id.*

Unquestionably, the Fair Housing Act's prohibition on discrimination in housing is imperative in a society that, even in the 21st century, clings to the vestiges of discrimination from a bygone era. However, by imputing personal liability via the Fair Housing Act on a sole owner and officer of a real estate corporation, who was neither aware of, nor authorized the discriminatory actions of his agent, the Ninth Circuit's decision could very well hinder the objective it seeks to achieve.

As other Federal circuits have recognized, personal liability on the part of corporate officers typically involves "instances of direct personal participation, as where the defendant was the 'guiding spirit' behind the wrongful conduct, or the 'central figure' in the challenged corporate activity." *Escude Cruz*, 619 F.2d at 908 (quoting *Marks v. Polaroid Corp.*, 237 F.2d 428, 435 (1st Cir. 1956); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 605-606 (3rd Cir. 1978)).

The scope of the Ninth Circuit's decision is vast: any officer or owner of a real estate corporation must now expect exposure to unlimited personal liability - no matter how innocent and far removed - virtually as a cost of doing business. The Ninth Circuit certainly realized the magnitude of its reach, deeming it as "... harsh punishment of an otherwise innocent employer." *Holley*, 258 F.3d at 1132. Yet, in a sprint past the language and intent of the Fair Housing Act, the Ninth Circuit chose to extend personal liability where none should have attached. *Id.* at 1135.

Unfortunately for the Respondents, their efforts at seeking redress from the offending agent, and from the corporation, proved unsuccessful. But that fact should not obscure the reality that the Respondents' remedy should have been confined to an action against the offending agent, or the corporation itself. Where there are no facts present that would otherwise mandate an extension of liability to an innocent owner or shareholder, or call for a piercing of the corporate veil, the corporate entity itself is designed to absorb liabilities stemming from the tortious acts of employees, agents, and officers of the corporation. *Lowell Staats Mining Co., v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1263 (10th Cir. 1989). "Generally, a corporation is treated as a legal entity separate from its shareholders to commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debts." *Id.* at 1263 (citations omitted).

A. LIMITED EXCEPTIONS THAT MIGHT ALLOW FOR A PIERCING OF THE CORPORATE VEIL ARE NOT PRESENT IN THIS CASE

The standards utilized to pierce a corporate veil[3] vary from state to state and from circuit to circuit; however, a court is most inclined to pierce the veil when a corporation is used "in furtherance of crime, to facilitate

[3] Defined as "[T]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." *Black's Law Dictionary* 1168 (7th ed. 1999).

fraud, to justify a wrong, or to defeat public convenience."[4]

In an earlier decision, the Ninth Circuit announced three factors to be used in determining whether or not to pierce the corporate veil: "... the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited on the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators." *Board of Trustees v. Valley Cabinet*, 877 F.2d 769, 773 (9th Cir. 1989) (citations omitted).

In addition to the Ninth Circuit, other courts have pierced the corporate veil where the corporate form has been used as nothing more than an instrument to commit fraud, or as a shell[5] and where it is shown that shareholders used the corporate entity "as a mere instrumentality for the transaction of their own affairs without regard to separate and corporate existence, or for the purpose of defeating or evading important legislative policy, or in order to perpetrate a fraud or wrong on another." *Lowell Staats*, 878 F.2d at 1263. In such instances, "equity will permit the corporate form to be disregarded and will hold the shareholders personally liable for the corporation's improper actions." *Id.*

Nowhere in its decision did the Ninth Circuit cite any of these veil-piercing factors. Indeed, the facts of the case simply do not support a claim that the corporate form was ever used as a fraudulent or criminal instrument.

[4] Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 Denv. U. L. Rev. 763 (1998).

[5] *See* John R. Jones, *Personal Liability?-Piercing the Corporate Veil*, 44 For The Defense 6, 41 (2002) (citing *Uchitel Co. v. Telephone Co.*, 646 P.2d 229, 234 (Alaska 1982); *Ross v. Playle*, 505 N.W.2d 515, 517 (Iowa App. 1993)).

Holley v. Crank, 258 F.3d 1127, 1129-1131 (9th Cir. 2001). Even while extending personal liability to Mr. Meyer, the Ninth Circuit went as far as to describe him as an "otherwise innocent employer." *Id.* at 1132. Consequently, the Ninth Circuit had no justifiable basis to view the subject corporate entity as anything other than an independent real estate corporation.

In lieu of a veil-piercing analysis, what the Ninth Circuit did do was impute personal liability under the Fair Housing Act on an otherwise innocent officer and owner. This Court should reverse the decision not because the goals of the Ninth Circuit's ruling, an attempted remedy of a discriminatory housing practice, are not laudable, but because the decision was not grounded in law.

B. THE NINTH CIRCUIT'S DECISION FINDING OFFICER AND OWNER LIABILITY IS NOT SUPPORTED BY THE FAIR HOUSING ACT

Arguably, in finding Petitioner Meyer personally liable under the Fair Housing Act, the Ninth Circuit employed its own type of veil-piercing technique.

In its ambitious search for liability, the Ninth Circuit found it in the "criteria" for the Fair Housing Act:

> "...[T]he criteria for the Fair Housing Act is different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling."

Holley v. Crank, 258 F.3d 1127, 1130-1132 (9th Cir. 2001) (citing 24 C.F.R. § 103.20 (1999)).

As Petitioner Meyer has very aptly pointed out, the Fair Housing Act neither defines, nor purports to expand, the class of persons who can be sued for alleged discriminatory housing practices. Petition for Writ of Certiorari at 9. Moreover, as Meyer also argues, the "criteria" used by the Ninth Circuit, namely a U.S. Department of Housing and Urban Development (HUD) regulation, 24 C.F.R. § 103.20 (1999), was arguably inapplicable to the case because the language relied upon by the Ninth Circuit had been struck from the regulation prior to the Court's ruling. Pet. 9-11.

In a case involving a claim of racial discrimination under the Fair Housing Act, a Federal District Court clearly stated that "no individual may be held vicariously liable simply because she is an officer or manager of the company," and that "... courts apply the doctrine of vicarious liability to the company, not the company's individual officers." *United States v. Lorantffy Care Center*, 999 F. Supp. 1037, 1046 (N.D. Ohio 1998) (citing *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974)). Additionally, a Federal Court has held that no liability should attach to the officers of a corporation, unless the officer "personally participated in the agent's acts, or knew of and ratified his acts and statements..." *See Heights Community Congress v. Hilltop Realty, Inc.*, 629 F. Supp. 1232 (N.D. Ohio 1983).

Moreover, as the U.S. Court of Appeals for the Fourth Circuit has held in a civil rights action, where a director "does not personally participate in the corporation's tort, general corporation law does not subject

him to liability simply by virtue of his office." *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1142 (4th Cir. 1975). Conversely, proof that a director of a corporation voluntarily and intentionally caused the corporation to act in the commission of a tort is sufficient evidence to make the director personally accountable for the tort. *Id.* at 1145.

Without a clear mandate from the Fair Housing Act, surely an officer or owner who was not aware of, nor ratified or participated in the discriminatory actions of his employees should not be held personally accountable for those actions. Although not a Fair Housing Act case, the First Circuit's logical finding in *Escude Cruz v. Ortho Pharmaceutical* should be adhered to nevertheless:

> "Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation."

619 F.2d 902, 908 (1st Cir. 1980) (citations omitted). By imputing personal liability on Mr. Meyer, via an expansion of the intent of the Fair Housing Act, the Ninth Circuit has bootstrapped onto a legal authority that does not exist.

Congress has enacted measures that provide a vehicle upon which personal liability may attach to otherwise innocent officers or owners of corporations for the wrongful acts of employees or agents. One such

example exists in the area of federal labor law.[6] As a consequence, the Ninth Circuit has previously recognized Congress's intent to expand personal liability and has ruled accordingly. *See, e.g. International Bhd. of Elec. Workers, Local 332 v. Hyland Wilson Elec. Contractors, Inc.*, 881 F.2d 820 (9th Cir. 1989) (stockholders subject to personal liability under federal Labor-Management Relations Act); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521 (9th Cir. 1979) (incorporators subject to personal liability under federal Farm Labor Contractor Registration Act).

However, the Fair Housing Act, even when construed broadly, was not intended to impose personal liability on an innocent officer or owner of a real estate corporation. Had that been their intent, Congress surely would have amended the law since its original enactment.

Therefore, the remedy for a violation of the Fair Housing Act should be confined to an action against the offending agent or employee, or to the corporate entity itself. The Ninth Circuit's decision is erroneous and should be overturned by this Court.

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[6] *See* Wilson McLeod, *Shareholders' Liability and Workers' Rights. Piercing the Corporate Veil Under Federal Labor Law*, 9 Hofstra Lab. L.J. 115 (1991)

II. IMPOSITION OF PERSONAL LIABILITY ON INNOCENT OFFICERS AND OWNERS OF REAL ESTATE CORPORATIONS WILL INHIBIT THE FUTURE PRODUCTION AND AVAILABILITY OF AFFORDABLE HOUSING STOCK

The Ninth Circuit's ruling extending personal liability to innocent officers and owners of real estate corporations threatens to inhibit the capital investment of myriad owners, builders, and managers of single-family and multi-family housing units in the United States.

For example, a significant amount of the financing for multi-family rental housing stock is pooled via the use of Real Estate Investment Trusts ("REITs").[7] A recent survey of eleven of the largest publicly-traded REITs indicates that over 900,000 residential units are currently owned, in development, or under management, by more than 200,000 shareholders of these REITs.[8] These numbers include only record and beneficial shareholders and do not account for the vast numbers of limited partners and silent partners who invest in, operate, and manage real estate through REITs.

[7] A REIT is an ownership entity that provides limited liability, no tax on the entity, and liquidity. Ownership is evidenced by shares of beneficial interest similar to shares of common stock. REITs were created by Congress to enable small investors to make investments in large-scale, income-producing real estate. *See* MIKE E. MYLES et al., REAL ESTATE DEVELOPMENT, PRINCIPLES AND PROCESS 95, 554 (Urb. Land Inst. 3rd ed. 2000).

[8] Analysis based on review of Securities and Exchange Commission data and research by NAHB Staff (accessed June, 2002) <http.www.sec.gov/edgar/searchedgar/companysearch.html>

Undoubtedly, the Ninth Circuit's extension of personal liability under the Fair Housing Act to officers, directors, and investors in REITs, will serve only to discourage investment in a sorely-needed sector of the housing market – affordable multi-housing. A diminishing level of affordable multi-housing rental units will exacerbate the already "critical housing needs[9]" of the Nation's populace, further hindering the ability of low-to-moderate-income renters to obtain quality housing.

Additionally, in an effort to increase minority homeownership and rental opportunities, home builders en masse have made a commitment to participate in low-income tax credit programs for the production of affordable housing in distressed areas. Specifically, the NAHB has committed to help low-income Americans, particularly minorities, achieve the dream of home ownership by increasing the number of minority home owners by 5.5 million over the next decade.[10]

Were the Ninth Circuit's decision upheld, some of the very same owners, investors, and property managers, who are committed to providing expanded home ownership opportunities for minorities and low-

[9] "Critical housing needs" has been defined as households that spend more than half of income on housing, or which live in substandard conditions. One in every seven renter households, over five million Americans, is included in this group. National Association of Home Builders, *Decent Affordable Housing. It's the American Dream* (2001).

[10] Realty Times Staff, *NAR, NAHB Endorse White House, HUD Minority Housing Initiative* (June 18, 2002). The NAHB strongly endorses the "Renewing the Dream" initiative, a tax credit program announced by the Bush Administration (June 15, 2002) to help low-income Americans, particularly minorities, achieve the dream of homeownership.

income citizens, would be subject to personal liability for the discriminatory acts of "rogue" agents and employees. Not only would the Ninth Circuit's decision not further the goals of equality in homeownership, it would have the debilitating effect of discouraging investment in and production of critically needed housing.

Finally, scores of home builders, including members of the NAHB, are engaged in high production home building, with the top 100 builders closing sales on over 320,000 residential units in 2001. This accounts for over 28 percent of the U.S. for-sale housing market and represents billions of dollars of investment in many of this nation's largest public and privately-traded real estate corporations.[11] In fact, just a sampling of one of the largest high production builders indicates that over 53 million outstanding shares are held by over 800 institutional investors.[12]

Given that thousands of sales agents and management staff are employed by high production builders, the Ninth Circuit's expansion of Fair Housing Act liability could have alarming effects on the owners and investors of these companies. An unauthorized discriminatory act by a single employee, of a staff of tens or even hundreds, puts at risk the officers and owners of a segment of the real estate industry that accounts for more than one-quarter of the for-sale residential housing market.

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[11] *Endangered Species? Consolidation Tests the Survival Skills of the Large Midsize Builder*, Builder, May 2002, at 126.

[12] <http://www.centex.com/investor_relations.htm> (assessed July 26, 2002).

The market segments cited above reflect only a small percentage of the total housing industry, which is projected to construct almost 1.6 million units in 2002. The Ninth Circuit's decision threatens to disturb the flow of investment into this vital industry. Surely, the Fair Housing Act was not intended to provoke such instability in America's housing markets.

CONCLUSION

The National Association of Home Builders respectfully requests that this Court reverse the United States Court of Appeals for the Ninth Circuit and rule that the Fair Housing Act does not extend personal liability to innocent officers and owners of real estate corporations for the unauthorized discriminatory acts of agents and employees of the corporation.

DATED: July 31, 2002

Respectfully submitted,

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